Supreme Court, U.S.
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No. 08-_____

In the
Supreme Court of the United States

Jon Gallant
Petitioner

v.

Terri Lynn Gallant,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Issue I: Does the due process clause of the 14th Amendment bar a state court from enforcing a divorce judgment predicated on arithmetic errors or on facts completely unsupported by the record evidence, where respondent demanded an equal division of the marital estate, and the trial court, applying Michigan law, properly determined that an equal division of the marital estate is warranted under all the circumstances, a finding upheld by the Michigan appellate judiciary, but the division of the marital estate is in fact grossly unequal, to the point that petitioner has been burdened with lifelong obligations of support which exceed his earning capacity, condemning him to forever live in abject poverty?

Issue II: Did the Michigan judiciary violate the supremacy clause, US Const, art VI, cl. 2, by awarding respondent the child dependency deduction for federal income tax purposes for tax year 2004 contrary to Treas. Reg. 1.21-4(d)(3) and by declaring that non-support provisions of the divorce judgment shall not be dischargeable in bankruptcy contrary to 11 USC §727(b) and 28 USC §1334(a) and (e), where exclusive jurisdiction over dischargeability determinations lies in the federal bankruptcy courts?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is Jon Gallant, Jr.. The parties to the state proceedings at issue were Jon Gallant, Jr., Teri Gallant, Jon Gallant, Sr., and Gallant Transport, Inc., a Michigan corporation wholly owned by Jon Gallant, Sr. and Jon Gallant, Jr.

There are no other corporations, limited liability companies, partnerships, limited partnerships, or juristic entities that are parties to this case. All natural persons party to this case are listed in the above paragraph.

There is no parent or publicly held company owning 10% or more of the stock of Gallant Transport, Inc.

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OPINIONS BELOW

The Michigan Supreme Court's order of March 24, 2008 denying leave to appeal is reported at 480 Mich 1134; 745 NW2d 783 (2008), and reproduced in Petitioner's Appendix A ("Pet Apx A"), Pet Apx 1a.

The Michigan Supreme Court's order of September 9, 2008 denying rehearing is officially reported at 482 Mich ___; 755 NW2d 171 (2008), and is reproduced at Pet Apx 3a (Appendix B).

The Michigan Court of Appeals decision issued June 21, 2007 is unreported (but found at 2007 Westlaw 1791713), and is reproduced at Pet Apx 5a (Appendix C).

The unreported Michigan Court of Appeals' order denying rehearing, issued August 21, 2007, is reproduced at Pet Apx 15a (Appendix D).

The Jackson (Michigan) circuit court's Amended Judgment of Divorce of September 7, 2005, is unreported, and is reproduced at Pet Apx 21a (Appendix E).

The Jackson (Michigan) circuit court's unreported Amended Findings of Fact dated June 27, 2005, are reproduced at Pet Apx 30a (Appendix F).

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment entered by the Michigan Court of Appeals on June

21, 2007 in this case, as to which the Michigan Supreme Court has refused discretionary review.

JURISDICTION

The Michigan Supreme Court denied petitioner's timely application for leave to appeal raising the within federal constitutional and federal statutory issues on March 24, 2008, and denied petitioner's timely motion for rehearing on September 9, 2008. The jurisdiction of this Court is based on 28 USC §1257(a) and Rule 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of the due process clause of §1 of the Fourteenth Amendment of the Constitution of the United States, Pet Apx 182a, (Appendix P), as well as the Supremacy Clause, US Const, art VI, cl. 2 (Pet Apx O), the pre-2005 versions of the dependency deduction provision of the Internal Revenue Code, 26 USC §152(d) and Treas. Reg §1.152-4(d)(3) (Pet Apx S), the discharge provision of the Bankruptcy Code, 11 USC §727(b) (Pet Apx Q, 183a), and the exclusive jurisdiction of the federal judiciary over bankruptcy issues, 28 USC §1334(a) and (e)(1) (Pet Apx R, 184a).

STATEMENT

INTRODUCTION

Petitioner Jon Andrew Gallant, Jr. requests review by certiorari of a March 24, 2008 order of the Michigan Supreme Court (Pet Apx 1a), denying discretionary review (leave to appeal) from a June 21, 2007 decision of the Michigan Court of Appeals

(Pet Apx 5a-19a), as to which a timely motion for rehearing was denied by order of August 21, 2007 (Pet Apx 20a). The Michigan Court of Appeals affirmed the Jackson County (Michigan) circuit court's property division in this divorce proceeding, including the allocation of child dependency deductions for tax year 2004 and a declaration of non-dischargeability of non-support provisions of the divorce judgment.

FACTS AND PROCEDURAL BACKGROUND

This lawsuit began as a simple divorce case with the filing of Teri Gallant's complaint in 2003. Divorce was initially granted by order of January 6, 2005. At the time Respondent initiated this divorce action in 2003, she was 42 years of age and Petitioner was 48 years old. Both parties were then, and remain, in good health. They had been married 21 years, and produced six children, of whom three remained minors when the case was filed (and one remains so).

A two-day trial was held in this matter on September 16 and 17, 2004. The marital estate was ultimately determined by the trial court to consist of the marital home, petitioner's 401(k) plan, and the three (3) business entities that petitioner and his father own in equal shares, to wit:

(1) J & J Real Estate Partnership
(2) Gallant Transport, Inc.
(3) Gallant Industrial Services, Inc.

The principal issue at trial concerned the value of

Petitioner's businesses[1]. Both the transport and industrial service enterprises are closely tied to Michigan's automobile industry; the real estate partnership merely owns the land occupied by the other two businesses. Business revenue and profit had been spiraling downward, to the point that respondent's own business valuation expert (Mr. Dupke) concluded that the value of Gallant Industrial is "zero" (Pet Apx 143a). Further, Dupke indicated that Gallant Industrial actually has a liquidation value of *minus* $143,000 (Pet Apx 151a, 153a).

The parties' joint and individual income tax returns and the corporate and partnership income tax returns—none of which was challenged by any witness (the Court of Appeals allowed that "[u]ncontroverted testimony established that defendant's income dropped precipitously in 2002 and 2003", Pet. Apx. 10a)—all reflect the devastating economic effect changes in the business environment were having long before this divorce action was initiated by respondent in June, 2003. The undisputed evidence is that in 2002 (*a year before the divorce*), petitioner's income, *including both salary and profit* from his half of the three businesses was just $30288, dropping to $8554 in 2003 and

[1] Particular testimony will be referenced as it becomes relevant to the arguments presented. In the end, the trial court averaged the valuations of the competing experts as to two businesses and adopted the valuation of petitioner's expert as to the third, and there is no dispute over the values thus assigned. Constitutional error arose in implementing those findings.

rising to $44781 in 2004[2].

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[2] The parties' 2002 joint federal Tax Return (Respondent's trial exhibit 4)—signed by both parties under penalty of perjury—showed salary of $25,000 and total earnings from partnerships and S corporations of $5,288; interest and dividends (excluding S corporation dividends, which are separately taxed as profit whether paid or not) brought their total taxable income up to $32,623 (there is no record evidence of any non-taxable income). The 2003 tax return (Respondent's trial exhibit 4A) reflects salary of only $16,000, with total earnings from partnerships and S corporations of **minus** $7446, with net taxable income of $11,069. The 2004 tax return shows that Petitioner's salary increased to $29,000 with income from partnerships and S corporations of $15,781, with net taxable income of $43,750. (Corporate returns prepared by the businesses' CPA, none of which was challenged for accuracy or verisimilitude by any witness, support the diminution in income and profit.

Note that, although the trial court relied on an offhand remark by respondent's expert Mr. Dupke (Pet Apx 141a) that petitioner could in theory control his level of salary from companies of which he is half owner, the notion that petitioner's taxable income was somehow subject to his whim or control was wrong as a matter of federal law. It is undisputed that petitioner's three businesses include one real estate partnership and two Subchapter S corporations. Such "pass through" enterprises pay no income taxes; instead, partnerships and Subchapter S corporations issue a Form K-1 to each partner/shareholder, on which is reflected that partner's/shareholder's pro rata share of any profit generated in proportion to their interests. If such an enterprise generates revenue that is not consumed by salaries to owners or other expenses, all such profit is passed through to the owners on their K-1s as income (IRS Form 1040, line 17), and taxed to them individually, whether or not any portion thereof is retained for a business purpose rather than distributed. 26 USC §1366(a)(1); *Gitlitz v CIR*, 531 US 206, 209; 121 S Ct 701; 148 L Ed 2d 613 (2001), citing *Bufferd v Commissioner*, 506 US 523, 525; 113 S Ct 927; 122 L Ed 2d 306 (1993). As the accuracy of petitioner's federal income tax returns was never in issue, attribution to petitioner of additional income or "earning

In 2000, petitioner's wages/salaries totaled $169,000.00, and in 2001, they were $174,000.00. However, in 2002, a year prior to respondent's filing for divorce and after Gallant Industrial lost its largest customer, petitioner's wages/salaries plummeted to only $25,000.00.[3] His wages/salaries in 2003 were only $16,000.00. In 2004, his wages/salaries improved to $29,000.00, but still far below the $174,000.00 he earned in 2001.

Child support was stipulated by the parties and judicially approved in the amount of $800/month for three (3) children, which amount exceeds Michigan's child support guidelines (Pet Apx 140a) for petitioner's income level, as the trial court noted in its Amended JOD (Pet Apx 25a-26a): "This amount, however, does exceed the guidelines, based on the parties' income information submitted at trial."

At the conclusion of trial, the trial judge directed the parties to present closing arguments in writing, and gave each party three (3) weeks to submit proposed findings of fact and law. (Pet Apx 161a).

Petitioner timely filed and served his Proposed Findings of Fact and Conclusions of Law on October 8, 2004. Respondent tardily filed and served her Proposed Findings of Fact and Conclusions of Law ("Respondent's Brief") on November 17, 2004,

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potential" proves to be without foundation in law or fact.

[3] The following year, respondent filed for divorce just as her husband was coping with saving the business enterprises that were the primary financial support of the family.

incorporating new information not introduced at trial (and to which Petitioner had no opportunity for cross-examination or rebuttal).

Although the trial court acknowledged the untimeliness of Respondent's Brief, it accepted and reassured Petitioner that it would not be influenced by any arguments that were not supported by the record:

> The Court: All right. Thank you. All right. Well, I'm going to certainly strike anything in his [respondent's counsel's] responsive pleadings that is not borne out and supported by evidence during the trial, and I think I have about 2 and a half legal pads full of notes that I took during the trial. (Pet Apx 165a-166a)

On December 21, 2004, the trial court issued its Findings of Fact and Conclusions of Law ("Initial Findings"), in which it determined that the marital estate should be equally divided (Petitioner's Appendix H). However, after determining the value of each of petitioner's businesses, it calculated the marital estate value without dividing those values in half in recognition of the fact petitioner had only a 50% interest in each business. It also ordered $700/month in rehabilitative alimony for a period of five (5) years.

In those Initial Findings, it is evident that the trial court did rely upon and was persuaded by certain statements and contentions made in Respondent's Brief that were not supported by the

record, in consequence of which it assigned an interest to Respondent in certain key-man life insurance policies owned by two (2) separate business entities of which Petitioner is only a 50% owner (Pet Apx 135a). Respondent's post-trial brief argued that the trial court could award her an interest in these policies despite the fact that they are not owned by Petitioner but by two (2) separate corporate entities (and, thus, non-marital in nature[4]). The trial court not only relied upon this unsubstantiated argument, it awarded Respondent a 50% interest in each of those policies (even though Respondent only requested that she be awarded a 25% interest in those policies[5]), which policies are discussed in greater detail below.

On January 6, 2005, a Judgment of Divorce prepared by Respondent's counsel ("the original JOD", Appendix G), was entered over the objections of Petitioner (Pet Apx 173a, 174a). Petitioner timely filed a Motion for Reconsideration on January 20, 2005, making the following arguments *inter alia*:

(i) the Judgment of Divorce unlawfully awarded to Respondent an interest in certain "key-man insurance" policies on the lives of Petitioner and

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[4] More importantly, the value of such insurance was taken into account in valuing both corporations, and thus in calculating the value to the marital estate of Petitioner's 50% interest in each corporation (Pet. Apx. 160a).

[5] Which would have been consistent with the trial court's stated intention of awarding each party half the marital estate, if Petitioner's half-interest in each corporation meant that such insurance policies had been putative marital assets not already valued as part of the valuation of each corporation.

Petitioner's father that were purchased and owned by corporations of which Petitioner is only a fifty percent (50%) stockholder;[6]

(ii) the Judgment of Divorce failed to address the tax treatment of the five (5) years of rehabilitative alimony awarded to Respondent; and

(iii) the Judgment of Divorce contained provisions that were inconsistent with the Initial Findings.

Petitioner's Motion for Reconsideration pointed out that, even assuming the trial court had jurisdiction to award fifty percent (50%) of said policies to Respondent, doing so would result in a "double dip" into the value of the corporations otherwise awarded to Petitioner: as the key-man insurance policies were owned by the corporations, each expert's valuation of the corporations necessarily took into account the value of these policies (Pet Apx 160a). In awarding to Petitioner

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[6] There are four (4) policies, which cumulatively had a face value of $2 million on January 1, 2003 (with cash surrender value on that date of $61,000 total, which has been exhausted by being applied to continue the insurance at an annual premium cost of $36,000 per the Amended Judgment of Divorce, (Pet Apx 36a-37a). Gallant Industrial Services, Inc., owns two and Gallant Transport, Inc. owns two; one pair insures the life of Petitioner and the other pair insures the life of Petitioner's father. Of course, Respondent has no insurable interest in the life of either Petitioner or his father, and an award to her of life insurance on either would be contrary to public policy, which wisely eschews permitting anyone to have a financial incentive to hasten the demise of a former spouse or former father-in-law. See Mich Comp L §552.101(2).

his fifty-percent (50%) ownership in these corporations, the trial court necessarily calculated the value of these corporations against Petitioner's share of the marital estate. Therefore, awarding any interest in these policies to Respondent, even if permissible, would result in an inequitable and unequal division of the martial estate.

The Motion for Reconsideration also pointed out that while the trial court stated in its Initial Findings that the reason for awarding an interest to Respondent in those policies was to "preserve the Petitioner's ability to pay both child support and alimony," requiring these policies to be maintained actually had the opposite effect. The premiums on these policies had been paid in the past from the remaining cash surrender value of each policy. If required to be maintained in effect, once the cash surrender value was exhausted, the corporations would be forced to dip into their revenues to pay the premiums. This would result in Petitioner receiving less income and, therefore, impair his already limited ability to pay child support and alimony. Further, the annual premiums for these policies total more than $36,000 and yet Petitioner's combined obligation for child support and alimony is only $18,000/year.

The corporate entities that own the key-man insurance policies and Petitioner's father, who is the beneficiary of certain of those policies, were forced to bring a motion to intervene to challenge the trial court's jurisdiction to make determinations affecting their interests in the key-man insurance policies.

At a hearing on April 14, 2005, the trial court ruled that it had erred in granting to Respondent any interest in the key-man policies:

> The Court: . . . So, I'll make a ruling at this point. I'm going to make a ruling that the Court should not have considered those corporate policies as a[n] [ap]portionable marital asset. (Pet Apx 177a-178a)

The trial court then indicated that, unless the parties were able to settle the matter by May 9, 2005, it would equitably reapportion the marital estate (Pet Apx 179a-180a).

On June 27, 2005, the trial court issued its "Final Order and Conclusions of Law After Divorce Trial and Motion for Reconsideration and to Pay Marital Expenses Incurred Between 09/21/04 to Date of Entry of Judgment of Divorce" (hereinafter the "Final Findings", Appendix F). In its Final Findings (Pet Apx 59a, the trial court stated:

> The Court legally erred in concluding that one-half of these [key-man insurance] policies created an interest in the [Petitioner] individually, which were part of the marital estate. The life insurance policies owned by Gallant Industrial Services, Inc. and Gallant Transport, Inc. They are not owned individually or severally in any capacity by the [Petitioner].

> Pursuant to the arguments of the [Petitioner] and the Intervenors, the Court legally erred in not determining that these life insurance policies were "key-man insurance" which are kept in place to provide the corporate insurer [(*sic*) enterprise] with the liquidity and ability to purchase its stock back from a deceased shareholder.

In its Final Findings, the trial court stated that it was again awarding each party one-half the marital estate. However, the trial court reallocated the marital estate and greatly increased Petitioner's alimony obligation, the terms of which were incorporated into an Amended Judgment of Divorce ("the Amended JOD", Appendix E) that was entered, again over Petitioner's objections, on September 7, 2005. Despite determining it had no jurisdiction to award an interest in the key-man life insurance policies to respondent, the trial court without explanation increased petitioner's alimony obligation by requiring him to pay respondent's medical, prescription, optical and dental insurance *for the rest of her life*, or until such time as she obtains employment or has comparable insurance she can obtain at a reasonable price through her employment or through the government when she becomes eligible (Pet Apx 35a). Further, the trial court ordered that petitioner secure his child support, alimony, and health insurance obligations by purchasing life and disability insurance.

The Amended JOD changed the original JOD in several significant respects:

(a) Respondent's share of Petitioner's 401(k) was dramatically increased: the original JOD awarded Respondent $211,459.33, whereas the Amended JOD gives her $318,876.81 (Pet Apx 47a-48a). In addition to the increased award to Respondent, she was awarded any and all increases in the value of the entire 401(k) plan, which accrued between July 13, 2004, and the date of segregation by the Plan Provider[7] (Pet Apx 48a-49a). The implementing QDRO was entered September 8, 2005.

(b) Unlike the original JOD, the Amended JOD requires Petitioner to maintain and pay for Respondent's insurance policies to cover her medical, prescription, optical and dental needs for the rest of her life, "or until such time as she obtains employment which provides comparable insurance that she can obtain at a reasonable price through her employment, or until such time as she is eligible for same through the government." (Pet Apx 35a) **This obligation does not cease even if Respondent should remarry.**

(c) The Amended JOD requires Petitioner to carry a life insurance policy on his life with a face value equivalent to the sum of his child support obligation of $800 per month currently for three

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[7] Segregation occurred on January 26, 2006, at which time the interest and earnings on the 401(k) from July 13, 2004 to January 26, 2006 amounted to $114,296.50, of which half was immediately put in respondent's name and half held in escrow pending appeal (and recently released to respondent).

children, plus his cash alimony obligation of $700/month for 5 years commencing January 6, 2005, plus the cost of all health care coverages he is required to provide and maintain for Respondent, including medical insurance, potentially for the rest of her life (the cost of which is not capable of being determined – see September 19, 2005 letter from Walton Agency (Appendix S, Pet Apx 186a). No similar provision appears within the original JOD.

(d) The Amended JOD further requires (Pet Apx 36a) Petitioner to secure, at his undetermined expense, "disability policy(ies), on a declining balance, to secure his obligation to pay alimony in the amount of $700.00 per month for five (5) years beginning January 6, 2005, child support in the amount of $800.00 per month, and the cost of all of the health care coverages which the Petitioner is required to provide and maintain for the Respondent as set forth herein." The original JOD contained no such requirement.

(e) The Amended JOD (Pet Apx 39a) awards respondent the child dependency deduction for federal income tax purposes for tax year 2004 (and all subsequent tax years, which is not challenged here due to an amendment to the Internal Revenue Code for tax years 2005 and beyond).

(f) The Amended JOD (Pet Apx 38a) declares that non-support provisions of the judgment shall be non-dischargeable in bankruptcy.

In the end, respondent was awarded more than 62% of the marital estate, and an even larger percentage of total marital income going forward. Respondent's award of $464,745.81 was comprised of $145,869 net equity in the marital home, and $318,876.81 from her share of petitioner's 401(k) savings. That amount does not include the further award to respondent of all interest and earnings on the 401(k) from the date of the Original JOD to the date of segregation (1/26/06), another $114,296.50. Nor does that reflect the award to respondent of "marital" expenses from September 21, 2004 to August 5, 2005 amounting to approximately an additional $32,000 (more than a year's earnings for petitioner). Her actual total (excluding "marital expenses") is thus $578,942.31.

In contrast, petitioner's supposedly "equal" share was comprised of $10,000 as the value of Gallant Industrial Services, $214,835 for Gallant Transport, Inc., $70,000 for J & J Real Estate, and $169,910.81 as the remainder of his 401(k) account. Those figures were supposed to reflect one-half the value of each business, based on petitioner's half–interest in each one. And those numbers do indeed add up to $464,745.81.

That calculation, however, reflects a fundamental arithmetical error by the trial court[8]—the trial court

[8] Respondent's own counsel conceded that the property division was the product of an obvious arithmetical error, and the trial court agreed (Pet. Apx 170a-171a). The original JOD reflected correction of that error (except as to Gallant Industrial, but that

found that the *total* value of Gallant Industrial Services is $10,000 (Pet Apx 69a) and that the *total* value of Gallant Transport is $214,835 (Pet Apx 70a). But it is undisputed that petitioner only owns a one-half interest in each business (Pet. Apx. 6a), so petitioner's award of marital property is actually $112,417.50 *below* the $464,745.81 intended, leaving the parties with grossly disparate awards ($578,942.31 to $352,328.31, or 62.16693% to 37.83307%) which flatly contradicts the trial court's stated intent to equally divide the marital estate (Pet Apx 75a).

The Michigan Court of Appeals recognized the trial court's corporate valuation error in its June 21, 2007 decision (Pet Apx 11a, Appendix C), but wrongly asserted that the trial court corrected the error in an order of January 5, 2005[9]. Whatever the provisions of the January 5/6, 2005 order, they were superseded by the trial court's September 7, 2005 Amended Judgment of Divorce, where the trial court again awarded respondent $318,876.81 from petitioner's 401(k) (Pet Apx 47a-48a). Respondent also was awarded the entire $114,296.50 in interest accrued in the 401(k) account between July 12, 2004 and the date of segregation (Pet Apx 48a-49a). The Michigan Court of Appeals' affirmance means that

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error was only $5000), awarding respondent only $211,459.31 from the 401(k) plan. Yet the error was nonetheless resurrected in the final judgment, which awards her $318,876.81 instead.

[9] There was no order entered on January 5, 2005; the Original JOD was entered on January 6 and did correct the arithmetic error, but that correction was superseded, and the error revived, in the Amended JOD entered September 7, 2005.

the $112,417.50 error, plus $114,296.50 in interest and earnings in the 401(k) plan, now go to respondent, leaving an intended equal division of the marital estate grossly skewed in her favor.

REASONS FOR GRANTING THE PETITION

Divorce probably represents, if not the single most common type of civil litigation in the courts of the various states, then something very close to it. With nearly half of all marriages ending in divorce, 11% of American adults currently divorced, and 25% of American adults having had at least one divorce during their lifetime[10], that the parties to divorce actions must have their due process rights to liberty and property protected and preserved is manifest. Moreover, because everything owned by married persons, and all of each spouse's future earnings, may be subject to division and allocation in the event of a divorce, the notion that federal due process principles put some limit on the wide discretion generally exercised by divorce courts under state law is not only of the utmost significance to our national jurisprudence, but to the economic welfare of our society.

Meanwhile, three States (California, Massachusetts, and Connecticut) now allow and recognize

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[10] Barna Research Group, Dec. 21, 1999 (based on a study of 3,854 American adults), reporting accuracy to ±2%). The Census Bureau reports that 23.1% of all U.S. residents over the age of 15 have been divorced, based on 2001 data from 30,000 households. Rose M. Kreider, *Number, Timing and Duration of Marriages and Divorces: 2001*, Current Population Reports, Pub. 70-97, US Census Bureau, Washington, DC (February, 2005), Table 3.

marriages between persons of the same gender, while a growing number of states (Hawaii, Maine, Maryland, New Jersey, New Hampshire, Oregon, Vermont and Washington) and the District of Columbia permit civil unions for persons of the same gender. A panoply of foreign countries[11] permit same-sex unions, which must be recognized by the United States and the several states as a matter of comity or treaty obligation when their citizens sojourn in our midst. Hence, the importance of federal due process to divorce or equivalent separations will only increase.

Thus, this case, which presents just the kind of errors—mistakes of arithmetic and the making of findings of fact without any supporting evidence—to which federal due process principles usefully apply, comes to this Court as both a suitable vehicle for addressing the constitutional issue and at an opportune time in our nation's history for clarifying such constitutional limitations on an area of jurisprudence traditionally viewed as primarily of state and not federal concern.

Issue I: The due process clause of the 14th Amendment bars a state court from enforcing a divorce judgment predicated on arithmetic errors or

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[11] Countries with amicable relations with the United States which currently recognize same-sex unions include Andorra, Argentina, Australia, Belgium, Brazil, Canada, Colombia, Czech Republic, Denmark, Ecuador, Finland, France, Germany, Hungary, Iceland, Ireland, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and Uruguay.

on facts completely unsupported by the record evidence, where respondent demanded an equal division of the marital estate, and the trial court, applying Michigan law, properly determined that an equal division of the marital estate is warranted under all the circumstances, a finding upheld by the Michigan appellate judiciary, but the division of the marital estate is in fact grossly unequal, to the point that petitioner has been burdened with lifelong obligations of support which exceed his earning capacity, condemning him to forever live in abject poverty.

ISSUE PRESERVATION

The record reflects that the arithmetic and evidentiary errors which, when ignored, engendered the due process issue were raised and addressed in the trial court, as well as in the Court of Appeals, which both sufficiently presented the issue and preserved the issue for appeal under both state law, *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992), and federal law, *First English Evangelical Lutheran Church of Glendale v Los Angeles*, 482 US 304, 313 n. 8; 107 S Ct 2378, 2385 n. 8; 96 L Ed 2d 250 (1987). In any event, a Michigan court is empowered to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and resolved. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999).

Further, as the Michigan Court of Appeals itself has repeatedly held, "the trial court was bound to follow the law, notwithstanding the fact that it was

not called to the court's attention." *People v Glover*, 47 Mich App 454, 458; 209 NW2d 533 (1973). Here, of course, the due process issue was called to the trial court's attention prior to the entry of final judgment once its errors were manifested; nothing further was required to preserve these issues for appeal even under state law. *Adam v Sylvan Glynn Golf Course, supra*, 197 Mich App at 98.

ANALYSIS

This issue presents a question as to the application of federal constitutional law. Pursuant to US Const, Amendment 14, §1 (Appendix P, Pet Apx 182a), no State may deprive any person of liberty or property without due process of law.

Michigan law is clear that marital property divisions and spousal support determinations must produce "rough congruence" absent fault or other justification for disparity, *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994), and when the trial court in this case, after a trial, itself found that an equal division was the proper outcome, allowing a grossly unequal division of the marital estate, and an absurdly one-sided division of income, to stand deprives Petitioner of his property in violation of his due process rights under both US Const, Amend 14, §1, which precludes any determination in civil actions not supported by a modicum of actual evidence. *In re Japanese Electronic Products,* 723 F2d 238, 304, n. 55 (CA 3, 1983)[12], citing *Vachon v*

[12] Rev'd on other grounds *sub nom Matsushita Electric Industrial Co v Zenith Radio Corp,* 475 US 574; 106 S Ct 1348; 89 L Ed 2d 538 (1986).

New Hampshire, 414 US 478, 479-480; 94 S Ct 664; 38 L Ed 2d 666 (1974) and *Thompson v Louisville*, 362 US 199; 80 S Ct 624; 4 L Ed 2d 654 (1960); *Spruytte v Walters*, 753 F2d 498, 508-509 (CA6, 1985).

Indeed, even where there is some evidence to support a determination, if such evidence becomes insubstantial in the face of contrary evidence, then due process forbids a finding based on insubstantial supporting evidence. *Schware v Bd of Law Examiners of State of New Mexico*, 353 US 232, 246-247; 77 S Ct 752; 1 L Ed 2d 796 (1957). And it must be borne in mind that the state of Michigan exercises a monopoly over divorce; all aspects of a divorce must be judicially sanctioned before any part of the divorce is official, and parties may not be divorced privately. *Boddie v Connecticut*, 401 US 371, 375-376; 91 S Ct 780; 28 L Ed 2d 113 (1981). Also, even where the parties agree on aspects of a divorce, in Michigan discretionary judicial approval remains necessary before any judgment effectuating such private agreements can be entered. *Greene v Greene*, 357 Mich 196, 202; 98 NW2d 519 (1959); *Harvey v Harvey*, 470 Mich 186, 188 ff; 680 NW2d 835 (2004).

Where, as here, respondent bore the burden of proof on all claims as to the value of the marital estate, what would constitute a fair division of that estate, and the amount of petitioner's actual income and what would be fair in the way of spousal support given petitioner's child support obligations, due process nonetheless bars a judgment that is based on no evidence whatsoever, or which is contrary to all

the *competent* substantive evidence. As was remarked in *TXO Production Corp v Alliance Resources Corp*, 509 US 443, 471; 113 S Ct 2711; 125 L Ed 2d 366 (1993), (Scalia and Thomas, JJ. concurring):

> Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering); * * *

Although this case was tried to the bench rather than a jury, the due process clause does not allow judges more leeway to rule in defiance of a factual basis, still less in a manner contrary to elementary principles of arithmetic. *Justices of Boston Mun Ct v Lydon*, 466 US 294, 310-311; 104 S Ct 1805; 80 L Ed 2d 311 (1984)[13].

In its present posture, this case stands as an

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[13] While this Court has definitively demanded independent judicial evaluation of the sufficiency of the evidence in relation to a trier of fact's determination that proof meeting the legal standard has been adduced to support every element of a criminal offense, even on collateral federal review, *Jackson v Virginia*, 443 US 307, 316-319; 99 S Ct 2781; 61 L Ed 2d 560 (1979), to date it has not, in a majority decision, expressed such a sentiment in relation to civil cases, although the due process clause of the 14th Amendment applies equally to deprivations of liberty as to property. Given the unavailability of collateral federal review in civil matters, it is all the more crucially important that this Court not close its doors or abandon its sacred duty to those seeking due process on their only chance for direct federal review in civil matters.

egregious exemplar of gross injustice that surpasses the obscene. Even respondent's counsel conceded the arithmetical error that led to a significantly disparate property division [TR 12/22/04, pp. 4-5]. The alimony award violates the fundamental tenet of Michigan divorce jurisprudence that neither party be left impoverished by a divorce decree, especially where as here fault is not an issue. *Moore v Moore,* 242 Mich App 652, 654; 619 NW2d 723 (2000). The trial court also clearly erred in imposing a variety of insurance obligations—health, life, and disability *inter alia*—on petitioner without calculating their actual cost or value, and without factoring in petitioner's ability to pay. *United States v Rylander,* 460 US 752, 757; 103 S Ct 1548, 1552; 75 L Ed 2d 521 (1983); *Shillitani v United States,* 384 US 364, 371; 86 S Ct 1531, 1536; 16 L Ed 2d 622 (1966).

Respondent's own expert, Mr. Dupke, acknowledged that transportation is a business that does not generate "huge profits", and that Gallant Transportation is an underperforming company in terms of the profit generated for the assets invested (Pet Apx 148a-149a), while Gallant Industrial is completely moribund (*id.*, Pet Apx 145a) and has *negative equity* of $172,982 (*id.*, p. 110). That "underperformance" is a product of a "tough market" (Dupke's phrasing, *id.*, p. 95) for transportation services, as detailed in the trial record (Pet Apx 150a). Any reliance on the notion that petitioner's future earnings/profits may return to earlier levels is entirely speculative, equivalent to "condemnation without trial" and the antithesis of the fair determination essential to due process. *Ohio Bell*

Telephone Co v Public Utility Comm'n, 301 US 292, 300; 57 S Ct 724, 728; 81 L Ed 1093 (1937).

Here, the undisputed evidence is that in 2002 (*a year before the divorce*), defendant's total income, *including both salary and profit* from his three businesses (Gallant Industrial Services, Inc., J & J Real Estate, and Gallant Transportation, Inc.), was just $30288, dropping to $8554 in 2003 and rising to $44781 in 2004[14]. From this meager **pre-tax** income, defendant must pay $800 per month in child support, $700 per month in alimony, and $400 per month (rising 10+% per year) in additional alimony (Amended Judgment, p. 13) by way of health insurance premiums for respondent, and $42 annually to the Michigan Friend of the Court, or $22,842 annually, plus the ruinous cost of insurance premiums for life and disability insurance to cover future alimony, health insurance, and child support in the event of his death[15] or disability. For 2002,

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[14] The parties' 2002 *joint* federal Tax Return—which both parties signed under penalty of perjury—showed salary of $25,000 and total earnings from partnerships and S corporations of $5,288; interest and dividends (excluding S corporation dividends, which are separately taxed as profit whether paid or not) brought their total taxable income up to $32,623 (there is no record evidence of any non-taxable income). The 2003 tax return reflects salary of only $16,000, with total earnings from partnerships and S corporations of **minus** $7446, with net taxable income of $11,069. The 2004 tax return showed that petitioner's salary increased to $29,000 with income from partnerships and S corporations of $15,781, yielding net taxable income of $43,750.

[15] The cost of such insurance would be in the range of $20,000 per year, notwithstanding that, if defendant dies, his obligation to pay alimony or child support dies with him. *Kurz v Kurz*,

this would have left petitioner (*before* taxes and not including life and disability insurance premiums) with $9,781 for himself, **minus** $11,773 for 2003, and $20,908 for 2004, or a three year total, *before* taxes, of $18916 ($6305.33 per year). From this, petitioner must provide housing for himself and his minor children (so he can enjoy his parenting rights, including 156+ overnights), food, transportation, etc.—while respondent enjoys a $192,000 house (with a mere $43000 mortgage) to cover her housing needs.

Issue II: The Michigan judiciary violated the supremacy clause, US Const, art VI, cl. 2, by awarding respondent the child dependency deduction for federal income tax purposes for tax year 2004 and by declaring that non-support provisions of the divorce judgment shall not be dischargeable in bankruptcy, where exclusive jurisdiction over dischargeability determinations lies in the federal bankruptcy courts.

ISSUE PRESERVATION

The dependency deduction award and non-dischargeability declaration were raised as issues both on petitioner's appeal of right to the Michigan Court of Appeals (which ignored the issues), and again in petitioner's application for leave to appeal to the Michigan Supreme Court, which both sufficiently

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178 Mich App 284, 297; 443 NW2d 782 (1989)(alimony); *Smith v John Hancock Life Ins Co*, 65 Mich App 193, 196; 237 NW2d 244 (1975) (child support); *Merchant v Merchant*, 130 Mich App 566, 574; 343 NW2d 620 (1983) (child support). Nonetheless, petitioner may be charged with contempt of court for failing to provide such insurance.

presented the issue and preserved the issue for appeal under state law, *Adam v Sylvan Glynn Golf Course, supra,* 197 Mich App at 98, as well as under federal law, *First English Evangelical Lutheran Church of Glendale v Los Angeles, supra,* 482 US at 313 n. 8. Under Michigan law, Petitioner was not required to move for new trial in order to raise such issues on his appeal of right. *Bunda v Hardwick,* 376 Mich 640, 672; 138 NW2d 305 (1965). Additionally, under both Michigan and federal appeal and error jurisprudence, whether the lower court(s) had proper subject matter jurisdiction may be raised at any time, and need not be preserved. *Fox v Bd of Regents of Univ of Mich,* 375 Mich 238, 242-243; 134 NW2d 146 (1965); *United States v One 1985 Cadillac Seville,* 866 F2d 1142, 1145 (9th Cir, 1989); *Allen v Secretary of Health and Human Services,* 781 F2d 92, 94 (6th Cir, 1986).

ANALYSIS

Generally, "State courts possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law". *ASARCO Inc v Kadish,* 490 US 605, 617; 109 S Ct 2037, 2045; 104 L Ed 2d 696 (1989). But for that very reason, to avoid federal legal rights being applied differently in all fifty states, or as here being completely denied without any direct federal judicial involvement, Congress has wisely assured that this national Supreme Court is endowed with jurisdiction to review any state court judgment that involves any title, right, privilege or immunity based on federal statute. 28 USC §1257(a).

The Michigan courts first violated the supremacy clause, US Const, Art VI, cl. 2 (Pet Apx 181a), by awarding Respondent the child dependency and tax credit deductions for federal income tax purposes for the 2004 tax year, contrary to 26 USC §152(d)[16] and Treas Regs §1-152-4(d)(3) (2004 version, Pet Apx 185a). Only this Court on direct review may be positioned to prevent the Michigan courts from usurping petitioner's federal statutory right (due to res judicata in any collateral tax filing) to claim the federal income tax child dependency exemptions based on his being the parent providing the majority of each minor child's support in 2003 and 2004.

Similarly, the Michigan judiciary exceeded its authority and contravened the supremacy clause, US Const, Art VI, cl. 2, by arrogating to itself the power to declare the non-dischargeability of non-support provisions of the judgment (Pet Apx 38a). What debts are dischargeable under the Bankruptcy Code, USC Title 11, is a matter of purely federal law. *Brown v Felsen*, 442 US 127, 134-135; 99 S Ct 2005; 60 L Ed 2d 767 (1979); *Gionis v Wayne (In re Gionis)*, 170 Bankruptcy Rptr 675, 681 (9th Cir BAP 1994); HR Rep No 595, 95th Cong, 2d sess., 364, reprinted in 1978 US Code Cong and Admin News 5787, 6320; see also *Bardes v First Nat'l Bank*, 178 US 524, 532; 20 S

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[16] The 2004 Working Families Tax Relief Act, Pub L 108-311,§201, amended 26 USC §152 by adding §152(C)(1)(B) and (c)(4)(B), which replaced the support test with a place of abode test, which favors respondent for tax years beginning on or after January 1, 2005. See also the current versions of 26 USC §152(e)(4)(A) and Treas Regs §1.21-1(b)(5)(ii).

Ct 100; 44 L Ed 1175 (1900). And the jurisdiction of the federal bankruptcy courts under 11 USC §§727(b) (Pet Apx 183a) and 28 USC §1334(a) and (3) (Pet Apx 184a) is exclusive. *Tennessee Student Assistance Corp v Hood*, 541 US 440, 447; 124 S Ct 1905; 158 L Ed 2d 764 (2004).

The Michigan judiciary's declaration of non-dischargeability is also substantively erroneous, being contrary to the plain terms of 11 USC §§ 727(b) (Pet Apx 183a), which declares that a discharge "discharges the debtor from all debts that arose before the date of the order for relief under this chapter" "except as provided in section 523 of this title) and 523(a)(5) (which precludes discharge only of a "domestic support obligation". This creates a conflict with *In re Jodoin*, 209 Bankruptcy Rptr 132, 137-138 (9th Cir BAP, 1997), which powerfully supports granting certiorari.

This Court has recently recognized that it simply cannot continue to encourage lower courts to ignore the law by denying certiorari as a relinquishment of its error-correcting powers, or accept mere lip service to controlling federal law or federal constitutional principles as sufficient grounds for lower courts to evade further review. Where facts are found that, on proper analysis, are without requisite record support, resulting judgments cannot be allowed to stand if the independent judiciary is to fulfill its assigned role in protecting fundamental rights. *Snyder v Louisiana*, ___ US ___; 128 S Ct 1203, 1208 ff; 170 L Ed 2d 175 (No. 06-10119, decided March 19, 2008); see also *Agostini v Felton*, 521 US 203, 237; 117 S Ct 1997;

138 L Ed 2d 1396 (1997). In this case, likewise, this Court must invoke its error-correcting powers lest the lower courts regard inaction as a continuing license to disregard controlling requirements of due process under the federal constitution or the controlling provisions of federal law.

CONCLUSION

At the end of the day, where the lower courts' first concluded that an equal division of the marital estate was fair and equitable, but then, through arithmetic error and speculation, awarded more than 63% of the marital estate and a still larger share of marital income to respondent, saddling petitioner with alimony, child support, and insurance obligations to the point he is left homeless and impoverished, while facing the burden of insuring respondent's health for her lifetime (potentially even after his own has ended) must be reversed and the following relief be granted:

1. The marital estate should be equitably divided in accordance with the trial court's unchallenged original findings on a true 50/50 basis with respondent awarded $211,459.33 of the 401(k), plus no more than a pro rata share of all interest or market increases until actual division of this asset (segregation by the plan administrator);
2. Elimination of any post-original JOD obligation by petitioner to pay for medical, dental, optical and prescription coverage for respondent;
3. Elimination of any obligation by petitioner to secure his obligations for alimony (including the premiums for the various health care coverages

for respondent's benefit) and child support by means of both life and disability insurance;

4. Removal of any direction regarding the parties' 2004 income taxes, including childcare deductions;

5. Removal of any declaration that non-support provisions of the Amended JOD are non-dischargeable in bankruptcy.

For the foregoing reasons, petitioner Jon Andrew Gallant, Jr. respectfully prays that his petition for certiorari be granted, or alternatively, pursuant to Supreme Court Rule 16.1, that the Court summarily reverse the lower court orders in this cause and direct that a division of the marital estate be made that accords with respondent's demand and the trial court's finding that an equal division is proper.

Respectfully submitted

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